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IN THE

Supreme Court of the United States

October Term, 1966.

No. 1196

JOSEPH DATLOF,

Petitioner,

vs.

UNITED STATES OF AMERICA.

PETITION FOR WRIT OF CERTIORARI TO REVIEW THE JUDGMENT OF THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT AND APPENDIX.

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Huntzinger Printing Corp., *Appellate Printers,* Camden, N. J.

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IN THE

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October Term, 1966.

No.

JOSEPH DATLOF,

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vs.

UNITED STATES OF AMERICA.

PETITION FOR WRIT OF CERTIORARI TO REVIEW THE JUDGMENT OF THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

TO THE HONORABLE THE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Joseph Datlof, hereby respectfully petitions your Honorable Court for Allowance of a Writ of Certiorari to review the judgment of the United States Court of Appeals entered December 29, 1966, and, in support thereof, submits the following data:

STATUTES INVOLVED.

Internal Revenue Code of 1954:

Sec. 3101. Rate of Tax.

In addition to other taxes, there is hereby imposed on the income of every individual a tax equal to the following percentages of the wages (as defined in Section 3121(a)) received by him with respect to employment (as defined in section 3121(b))—

* * * * * * * *

(26 U. S. C. 1964 ed., Sec. 3101.)

Sec. 3102. Deduction of Tax from Wages.

(a) *Requirement.*—The tax imposed by section 3101 shall be collected by the employer of the taxpayer, by deducting the amount of the tax from the wages as and when paid.

* * * * * * * *

(26 U. S. C. 1964 ed., Sec. 3102.)

Section 3111—Rate of Tax.

"In addition to other taxes, there is hereby imposed on every employer an excise tax, with respect to having individuals in his employ, equal to the following percentages of the wages (as defined in Section 3121 (a)) paid by him with respect to employment (as defined in Section 3121(b)).

(1) With respect to wages paid during the calendar years 1955 to 1959, both inclusive, the rate shall be 2 per cent; . . ."

Section 3502—Nondeductibility of taxes in computing taxable income.

"(a) The taxes imposed by Section 3101 of Chapter 21, and by Sections 3201 and 3211 of Chapter 22 shall not be allowed as a deduction to the taxpayer in computing taxable income under subtitle A.

(b) The tax deducted and withheld under Chapter 24 shall not be allowed as a deduction either to the employer or to the recipient of the income in computing taxable income under Subtitle A."

Sec. 3402. Income Tax Collected at Source.

(a) *Requirement of Withholding.*—Every employer making payment of wages shall deduct and withhold upon such wages a tax equal to 18 percent of the amount by which the wages exceed the number of withholding exemptions claimed, multiplied by the amount of one such exemption as shown in subsection (b) (1).

* * * * * * * *

(26 U. S. C. 1964 ed., Sec. 3402.)

Sec. 3403. Liability for Tax.

The employer shall be liable for the payment of the tax required to be deducted and withheld under this chapter, and shall not be liable to any person for the amount of any such payment.

(26 U. S. C. 1964 ed., Sec. 3403.)

Section 6653.

"(b) Fraud. If any part of any underpayment (as defined in subsection (c)) of tax required to be shown

on a return is due to fraud, there shall be added to the tax an amount equal to 50 percent of the underpayment. In the case of income taxes and gift taxes, this amount shall be in lieu of any amount determined under Subsection (a)."

Sec. 6671. Rules for Application of Assessable Penalties.

* * * * * * * *

(b) *Person defined.*—The term "person", as used in this subchapter, includes an officer or employee of a corporation, or a member or employee of a partnership, who as such officer, employee, or member is under a duty to perform the act in respect of which the violation occurs.

(26 U. S. C. 1964 ed., Sec. 6671.)

Sec. 6672. Failure to Collect and Pay Over Tax, Or Attempt to Evade Or Defeat Tax.

Any person required to collect, truthfully account for, and pay over any tax imposed by this title who willfully fails to collect such tax, or truthfully account for and pay over such tax or willfully attempts in any manner to evade or defeat any such tax or the payment thereof, shall, in addition to other penalties provided by law, be liable to a penalty equal to the total amount of the tax evaded, or not collected, or not accounted for and paid over. No penalty shall be imposed under section 6653 for any offense to which this section is applicable.

(26 U. S. C. 1964 ed., Sec. 6672.)

Section 1346(a)(1) of Title 28 U. S. C. provides as follows:

"The District Courts shall have original jurisdiction, concurrent with the Court of Claims of: any civil action against the United States for the recovery of any Internal Revenue tax alleged to have been erroneously or illegally assessed or collected, or any penalty claimed to have been collected without authority or any sum alleged to have been excessive or in any manner wrongfully collected under the Internal Revenue laws."

Section 1254(1) Title 28 U. S. C. provides as follows:

"Cases in the Courts of Appeals may be reviewed by the Supreme Court by the following methods:

(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree . . ."

OPINIONS BELOW.

The Opinion of the said Court of Appeals entered December 29, 1966, does not appear to be reported as yet. A copy of same is in the Appendix hereto at page 44.

The Opinion of the United States District Court for the Eastern District of Pennsylvania is reported at 252 F. Supp. 11. A copy of same is contained in the Appellant's Appendix (Court of Appeals) pages 436A to 486A.

JURISDICTION.

The Opinion and Judgment of the Court of Appeals was entered on December 29, 1966.

The statutory provision conferring jurisdiction on your Honorable Supreme Court to review said judgment is that provided under Act of June 25, 1948, C. 646, 62 Stat. 928,28. U. S. C. A. Section 1254 (1).

The Jurisdiction of the United States Court of Appeals for the Third Circuit is that provided under Title 28 U. S. C. Section 1291; and that provided for the District Court under Title 28 U. S. C. Section 1346. (Claim for Refund).

QUESTIONS PRESENTED.

I. (a) Did the Court of Appeals err in allowing the Government (Commissioner of Internal Revenue) to apply tax payments by Donchester Manufacturing Company, Inc., to the 2% (Excise) Employer's F. I. C. A. tax instead of applying them to payments on account of the 2% Employee's F. I. C. A. and withholding taxes for the four quarters of 1955?

(b) Did the Court of Appeals err in allowing the Government (Commissioner of Internal Revenue) to apply payments made on withholding and 2% Employee's F. I. C. A. taxes to the Employer's 2% F. I. C. A. tax instead of applying them as directed?

II. (a) If petitioner was the responsible person or officer of Donchester Manufacturing Company, Inc., were his acts of omission or commission willful under Section 6672 of 26 U. S. C. A.?

(b) Did the Appellate Court err in finding he was such a responsible officer and that his acts were willful under Title 26 U. S. C. Section 6672?

III. Did the Court of Appeals err in not finding the Government negligent in its failure to collect promptly Donchester's assets?

STATEMENT OF THE CASE.

This is a civil non-jury action filed by Joseph Datlof, plaintiff-appellant herein, against the United States of America, defendant-appellee, herein, wherein the appellant seeks a refund of $81.90 he has paid to the Internal Revenue Service, an agency of the United States of America.

On September 30, 1957, the Commissioner of Internal Revenue made an assessment against the petitioner Joseph Datlof, in the amount of $44,405.10. This sum represented the amount of unpaid social security taxes shown by tax returns filed on behalf of Donchester Manufacturing Company, Inc., to have been withheld from the wages of employees of Donchester Manufacturing Company, Inc., during the second, third and fourth quarters of 1955. The petitioner paid $81.90 of the penalty, that being the amount of said taxes owed for one employee with lawful interest thereon for the involved quarterly periods herein (said assessment being made under section 6672 of Title 26 U. S. C. (Internal Revenue Code of 1954) (100% Penalty)).

Subsequent to said assessment various amounts were collected which reduced the assessment to its present balance of $31,499.45.

Joseph Datlof, the taxpayer, is a citizen of the United States and of the Commonwealth of Pennsylvania. Taxpayer was the president and treasurer of the Donchester Manufacturing Company during the entire period when that firm was in existence (R. 437a).[1]

---

[1] "R." references are to the separately bound Appendix to taxpayer's brief.

Donchester was a corporation which was organized under the laws of the State of Delaware on or about October 25, 1945. From late 1945 until about December 31, 1955, the firm was engaged in the business of making clothing. During the three quarters of the calendar year 1955 which are in issue in this case, the corporation was located on the third, fourth, and fifth floors of the Pilling Building, at 23d and Arch Streets in Philadelphia, Pennsylvania (R. 437a).

The Donchester Manufacturing Company employed about 460 individuals. Federal income and employment taxes were withheld from the wages of these employees in the normal course of Donchester's business. However, not all of these withheld taxes were paid over by Donchester to the United States Government (R. 437a). At the time when Donchester ceased active operations at the end of the year 1955, the following amounts of employees' withholding and FICA taxes were due and owing from that firm (R. 437a-438a):

Quarter Ending	Amount Owed
June 30, 1955	$10,632.08
September 30, 1955	$14,798.45
December 31, 1955	$12,273.57
Total	$37,704.10

On September 30, 1957, the Commissioner of Internal Revenue assessed a 100% penalty under the provisions of Section 6672 of the Internal Revenue Code of 1954 against the individuals who were officers of the Donchester Manufacturing Company during the year 1955 (R. 438a).

The Commissioner's September 30, 1957, penalty assessment was timely assessed against both the taxpayer, Joseph Datlof, in his capacity as president and treasurer of Donchester, and against Samuel L. Schwartz, who was the vice-

president and secretary of Donchester. The original assessment was in the amount of $44,405.10, but this sum was subsequently abated by $6,701 as a result of the identification of certain payments of tax in that amount which had been made by Donchester shortly before it went out of business. As thus reduced, the amount of the joint and several assessment against Mr. Datlof and Mr. Schwartz came to $37,704.10, which is the same as the amount of the unpaid withholding and employment tax liabilities of the Donchester Manufacturing Company (R. 438a-439a).

Subsequent to the assessment and abatement described in the previous paragraph, Samuel L. Schwartz paid $3,640 in settlement of the assessment against him. In addition, the Government collected $2,482.75 out of the proceeds of a suit which had been commenced by Donchester in July 1955 against Bernard Stoumen Trading as Brentwood Knitting Mills. Finally, the Government received a payment in the amount of $81.90 from Mr. Datlof. It is this $81.90 payment which Mr. Datlof seeks to recover in the instant case (R. 439a).

As a result of the payments described in the previous paragraph, the amount of the unpaid balance on the Commissioner's September 30, 1957, penalty assessment has been reduced to $31,499.45, which is the amount of the Government's counterclaim in this action (R. 439a). The amount of the Government's original assessment, and the amounts of the abatements and payments described above are as follows (R. 439a-440a):

Original assessment ..... (September 30, 1957)		$44,405.10
Less Abatement as a result of identification of two previously unidentified payments of tax by Donchester	$6,701.00	6,701.00

Amount Unpaid as of January 17, 1958		$37,704.10
Less Schwartz Settlement Payment	$3,640.00	
Proceed of Suit Against Brentwood	$2,482.75	
Datlof Payment (Refund Demanded in This Action)	$ 81.90	
Total	$6,204.65	6,204.65
Unpaid Balance on Assessment (Amount of Gov't Counter-claim)		$31,499.45

Taxpayer paid the sum of $81.90 (as stated above) on October 23, 1961. On December 8, 1961, he filed a claim for a refund of that amount. This claim was disallowed in full on April 18, 1962. Thereafter, this suit was commenced on July 27, 1962. In its answer to Mr. Datlof's complaint, the Government asserted a counterclaim for the unpaid balance on its September 30, 1957, deficiency assessment, in the amount of $31,499.45 (R. 440a).

The Donchester Manufacturing Company.

As stated above, the Donchester Manufacturing Company was organized on October 25, 1945. An agreement to form this corporation had been drawn up in the year 1944 by taxpayer's attorney, but Donchester did not go into operation under the terms of this 1944 agreement. After taxpayer returned from wartime service, a new agreement to form a corporation was drawn up in 1945 and it was under the terms of this incorporator's agreement that Donchester came into existence on October 25, 1945 (R. 442a).

The original stockholders of the Donchester Manufacturing Company were the taxpayer (who held 50 shares of voting stock), and two brothers, Bernard and Abraham Stoumen (who held the remaining 50 shares of voting stock). In addition, Samuel L. Schwartz held 50 shares of nonvoting stock. The purpose of this arrangement was to insure that no corporate action could be taken without taxpayer's approval (R. 442a-443a).

Subsequently, in the year 1947, Abraham Stoumen died and a reorganization of the capital structure of Donchester was undertaken. After this reorganization, Abraham Stoumen's widow owned one-twelfth of the outstanding capital stock of Donchester. The remaining eleven-twelfths were divided in equal shares among taxpayer, Bernard Stoumen, and Samuel L. Schwartz. No further changes were made in the capital structure of the Donchester Manufacturing Company prior to the time when that firm ceased operations at the end of the year 1955 (R. 443a).

After the corporate reorganization described in the previous paragraph, all of the stock of Donchester (except that owned by the widow of Abraham Stoumen) was placed in a voting trust. One of the purposes of this voting trust was to insure that all of the stockholders of Donchester were in agreement on any change in company policy. Consequently, taxpayer could not be outvoted by Stoumen and Schwartz (R. 443a).

The original directors of the Donchester Manufacturing Company were taxpayer, Samuel L. Schwartz, and Harold Goodman. At a later date, however, Goodman was replaced by Wesley H. Caldwell, Esquire. From that date forward, there was no further change in the membership of Donchester's board of directors. Schwartz offered his resignation from the board in a letter dated December 21, 1955, but this resignation was not accepted, and Schwartz continued to serve as a board member until Donchester ceased to exist (R. 443a-444a).

At the time of Donchester's organization, taxpayer was elected president and treasurer, and Samuel L. Schwartz was elected secretary. At a later date, Schwartz was made both vice-president and secretary of the firm. There was never any change in the offices held by taxpayer: he was both president and treasurer of Donchester throughout that firm's entire existence (R. 444a).

Donchester was originally organized for the purpose of manufacturing textile products for a partnership owned by Bernard and Abraham Stoumen, which traded under the name of Fairplay Knitting Mills and under the name of Brentwood Knitting Mills. The relationship between Donchester and Fairplay-Brentwood were spelled out in a written agreement dated October 13, 1945, between those two firms. This October 13, 1945, agreement was virtually identical with the proposed 1944 agreement which had been drawn up by taxpayer's lawyer. Under the terms of the agreement of October 13, 1945, Fairplay-Brentwood was to have first call on Donchester's manufacturing facilities. In return, Fairplay-Brentwood agreed to advance Donchester's payrolls and to supply the necessary raw materials and parts for Donchester's operations (R. 444a-445a).

At trial, taxpayer testified (R. 41a) that "There was no limiting date" to the October 13, 1945 agreement between the Stoumens, trading as Fairplay-Brentwood, and himself. In response to a question by the court, taxpayer testified (R. 47a) that Donchester operated under the terms of this agreement "through 1955". Later in the trial, however, the Government produced an agreement dated October 13, 1946, between Bernard Stoumen, trading as Fairplay Knitting Mills and Brentwood Knitting Mills, and taxpayer and the Donchester Manufacturing Company. This agreement, by its terms, "terminated" and "cancelled" the agreement of October 13, 1945. Taxpayer was of the opinion that the signature on this agreement was his own. In addition, he

recognized and identified Bernard Stoumen's signature on this document, and the signature of Samuel L. Schwartz, which attests to his own signature. Later, taxpayer admitted that he had known about the existence of this 1946 agreement prior to the time of trial, but he stated that "This [Deft. Ex. 17] is not an agreement as far as I am concerned. I think this thing is false." No reason was offered by taxpayer in support of this conclusion. Taxpayer did admit, however, that he and the Stoumens had signed agreements under which they had severed all business relationships (R. 445a-446a).

Despite the severance of formal contractual relationships, Fairplay-Brentwood (or Brentwood as it subsequently came to be known) apparently continued to be Donchester's major customer for many years. Generally speaking, Brentwood purchased Donchester's entire output, although Donchester occasionally produced goods for firms such as the David Crystal Company. In addition, Donchester undertook a substantial Government contract in the year 1951 and another Government contract in the year 1953 (R. 446a).

What taxpayer described as "friction points" between Brentwood and Donchester began to develop in the year 1953 after Brentwood refused to purchase a jacket line which had been put into production by Donchester. Much more serious trouble developed in October 1954, when the time came to set the prices which Brentwood was to pay to Donchester for the goods in the line of spring samples which taxpayer had developed. Taxpayer had worked out his price estimates on this line of goods in terms of his overhead and direct labor costs and he believed that he would lose money if he sold Donchester's production at the price which Brentwood was willing to pay. Apparently, however, taxpayer was reassured by what he described as an oral promise by Brentwood to bring Donchester back to its financial condition as of October 1954, in the event that Don-

chester lost money on its "spring" line of goods. (In the clothing industry, the "spring" season runs from January through June or July (depending on the weather), and the "fall" season runs from July or August through the end of the year) (R. 446a-447a).

By January 1955, taxpayer's fears about losing money on the Brentwood spring line began to be realized. It then became clear to taxpayer that Donchester would either have to find other customers or go out of business. Hence, by January, 1955, he was actively soliciting future business from firms other than Brentwood (R. 447a).

At some time shortly after the events described above, taxpayer determined that Donchester would not do any further work for Brentwood after completion of work on Brentwood's spring line. Accordingly, taxpayer reported at the annual meeting of Donchester's board of directors which was held on February 21, 1955 (R. 447a-448a):

> He said he had records to show that if the special conditions with Brentwood had not occurred the company would still be in fairly good operating condition and show some profits. *He stated that they were not continuing to do any work for Brentwood after this spring* and that they had some contracts with Manhattan Shirt, Cluett, Peabody & Co. and McGregor Sportswear. He felt that the amount of business they would get from these companies by fall should keep them running 100% capacity and if they did, the company would operate profitably. (Emphasis added.)

Thus, starting in early 1955, taxpayer set out to solicit business from firms other than Brentwood to occupy 100% of Donchester's production facilities. Production of Brentwood's spring line (as established under the October 1954 arrangements) was completed. The last shipment to Brentwood was made about June 15, 1955. Meanwhile, taxpayer

had succeeded in obtaining business from a number of other firms. Consequently, at the meeting of Donchester's board of directors on May 4, 1955, taxpayer was able to present the following report (R. 448a-449a):

> Mr. Datlof reported that the Company was short of cash and might need cash to carry the payroll over the next few months.
>
> He also reported that the business which they expected from the concerns mentioned in the minutes of the February Meeting had materialized, and in addition they had obtained business from other concerns and were now doing work for the following Companies:
>
> Cluett & Peabody
> Manhattan Shirt Company
> McGregor Sportswear Company
> A. Berlin and Sons
> Banner Pants Company
> William Schwartz & Company
> Korday Sportswear.

Early in 1955, Donchester began to face substantial financial difficulties. In February and March 1955, the firm began to fall behind on bills to suppliers. In addition, Donchester failed to pay over to the Federal Government the withholding and employment taxes which that firm had collected from the wages of its employees during the first quarter of the calendar year 1955. However, subsequent payments by Donchester eventually succeeded in discharging the withholding and employment tax liabilities for that quarter (R. 449a).

By June of 1955, it became necessary for Donchester to obtain a $25,000 loan with its landlord, Morris Kardon. This loan was secured by a chattel mortgage covering much of the machinery of the Donchester Manufacturing Company (R. 449a).

At the trial, taxpayer indicated that he used the proceeds of the Kardon loan to pay a "net payroll" in the amount of $11,000, and a "vacation payroll" in the amount of $12,000. He used the remaining $1,000 to pay state taxes (R. 449a).

At about the same time that the Kardon loan was negotiated, taxpayer set out to sue Brentwood for approximately $60,000, for losses allegedly sustained in 1953, 1954, and 1955. A special meeting of Donchester's board of directors was called by taxpayer on July 18, 1955, to authorize taxpayer to make these claims against Brentwood. This authorization was granted, and taxpayer therefore sent a letter to Brentwood on July 18, 1955, demanding the sum of $59,634.52. Brentwood failed to respond, and, accordingly, taxpayer retained counsel to prosecute a suit in the Pennsylvania state courts against Brentwood (R. 450a).

Donchester's suit against Brentwood was based on the arbitration clause contained in paragraph 7 of the October 13, 1945, agreement. There was, however, a question as to the applicability of that clause because of the execution of the October 16, 1946, agreement. The suit was continued and was eventually settled for $2,482.75. That amount has been used by the Government to reduce the amount of the outstanding Section 6672 penalty assessment against taxpayer (R. 451a).

Simultaneously with these events, taxpayer contacted Joseph C. Martucci, an Internal Revenue Service collection officer, to discuss Donchester's unpaid withholding and employment tax liabilities. Taxpayer variously described the time of his first meeting with Mr. Martucci as "the latter part of July", the "first part of August", "the end of July of '55", or "in the middle of July". In a telephone conversation, taxpayer explained to Martucci that he knew Donchester was delinquent in its taxes. He also stated that the corporation had never been behind before (R. 292a,

452a). He then met personally with Martucci and explained the corporation's financial problems, indicating that they were caused by Brentwood's lack of payment (R. 381a, 453a).

Taxpayer wrote a number of letters regarding Donchester's unpaid taxes. On September 22, 1955, he wrote to Martucci to confirm the promise he had made to Martucci (during a conversation on September 21, 1955) to pay the first quarter's delinquent taxes by September 30, 1955. He wrote the District Director of Internal Revenue on September 28, 1955. On December 2, 1955, taxpayer sent a letter to Martucci (which was signed under his authority by his bookkeeper-secretary, Miss Doris Shaftman). He wrote to Martucci again on December 7, 1955, to plead for more time "to liquidate the current delinquency". In addition, taxpayer wrote to Donchester's attorney, Mr. Caldwell, on December 6, and December 23, 1955, enclosing checks for "withholding taxes". Taxpayer also "took to Mr. Martucci" a letter dated November 16, 1955, from one of Donchester's customers, in an attempt to prove that Donchester "would be running at full blast" and "would be in good shape" (R. 453a-454a).

In addition, taxpayer supplied the Internal Revenue Service with a copy of the chattel mortgage which he had given to Morris Kardon. Taxpayer also stated that "I kept them [the I.R.S.] abreast of the situation right along, all of the way down." And when Donchester finally did go down, taxpayer "went to the Internal Revenue Bureau" and "sat down * * * and explained * * * exactly what the situtation was" (R. 132a, 138a, 454a-455a).

Taxpayer's reason for carrying out these extended negotiations with the Internal Revenue Service was to prevent the Government from taking any steps to collect the delinquent taxes. As taxpayer saw it, if any steps at collection were taken, Donchester's labor force would cease

to work and the corporation would no longer be able to operate. Because of this entreaty by taxpayer and in order to allow Donchester to continue operation, Martucci agreed to allow the operation to continue running (R. 455a).

Meanwhile, in "June or July" of 1955 taxpayer was contacted by Fred Isaacson who was the head of a New York boyswear firm which was known at that time as L. Isaacson and Company. That firm is now known as Donmoor-Isaacson. Taxpayer recognized that "Donmoor", as the firm is commonly known, was "what we needed to replace Brentwood" (R. 357a, 455a). Of course, as outlined above, Donchester had ceased to accept any more business from Brentwood. However, the firms such as Cluett and Peabody and Manhattan Shirt, and the others which Donchester solicited in the year 1955, "never really amounted to any big bulk of goods" (R. 268a, 455a).

Donmoor dealt with Donchester through the Peay Manufacturing Corporation, which was a Pennsylvania corporation organized by Donmoor in June or July, 1955. The president of Peay was Richard Frankfort. Frankfort is Fred Isaacson's son-in-law. This led Isaacson to take an additional interest in the affairs of Peay, over and above the normal business interest which he had in a firm which was the sole source of supply of goods for one of his companies (R. 456a).

As originally organized, the purpose of the Peay Manufacturing Company was to act as an intermediary in connection with "contract arrangements" between Donmoor-Isaacson, on the one hand, and Donchester Manufacturing Company, on the other. As originally organized, Peay did not have any manufacturing facilities of its own. Peay depended entirely upon Donchester, its sole supplier, to produce the goods which Peay then sold to Donmoor (R. 456a). In July 1956 taxpayer claims to have explained to Isaacson what Donchester's tax and financial situation was. Isaac-

son testified, however, that taxpayer never made him aware of the fact that Donchester owed considerable sums for withholding taxes (R. 456a-457a).

Meanwhile, from July 1955 onward, Donchester was financing its operations, at least in part, out of the proceeds of advances made by the firms, such as McGregor, for which Donchester was producing goods. Similarly, the Peay Manufacturing Company was called upon to make advances to Donchester, and did so. In addition, Donmoor, Peay's corporate parent, advanced some of the payroll money needed by Donchester. As a consequence, the Isaacson firms, and especially Peay, lost heavily when Donchester failed (R. 457a).

In order to deal with Donchester's tax problems, taxpayer called a meeting in August 1955, which was attended by Mr. Schwartz, Donchester's secretary, Mr. Caldwell, Donchester's attorney, Mr. Sklar, Donchester's accountant, and taxpayer. At this meeting, taxpayer presented some figures which apparently related to Donchester's withholding tax liabilities and which had been prepared for taxpayer by Mr. Sklar (R. 457a).

Irvin Sklar is a certified public accountant with the firm of Sklar, Carmosin & Company. He visited Donchester once a month for audit purposes, and prepared Donchester's tax returns for signature by taxpayer. In addition to Donchester, Sklar's firm performed accounting services for Brentwood and for "many" other firms (R. 450a).

At a special meeting of Donchester's board of directors held on October 5, 1955, taxpayer reported on the progress of the suit against Brentwood. At this meeting taxpayer formally advised Donchester's board of directors of that firm's tax delinquencies (R. 458a-459a).

On Friday, October 7, 1955, taxpayer personally wrote a series of 46 checks in the total amount of $30,100.80 on Donchester's corporate checking account. All of these

checks were written over taxpayer's signature alone, and all were honored by the bank and paid. Each of these checks discharged some obligation of Donchester's other than its federal withholding and employment tax obligations. For example, Check Number 10746, written by taxpayer on October 7, 1955, is his own paycheck in the amount of $329. Other checks written on that same date were for payroll, union dues, petty cash, gas, Philadelphia Shirt and Pajama Manufacturer's Association dues, delivery charges, a subcontractor's payroll, machines, thread, webbing, shape tickets, sewing machine parts, tools, trimmings, help wanted ads, electrical maintenance work, stamp pads, woven labels, shade numbering, oil, polyethylene bags, and paper boxes. In short, after having announced on October 5, 1955, that Donchester was approximately $35,000 behind on its federal withholding tax payments, taxpayer then proceeded on October 7, 1955, to pay $30,100.80 in Donchester's funds to creditors other than the Federal Government (R. 459a-460a).

At the trial of this case, a total of 174 checks, bearing taxpayer's signature alone, were introduced into evidence. The trial court found that taxpayer disbursed Donchester's funds in the total amount of $108,072.09 between July 14, 1955 and January 3, 1956, by means of checks bearing his signature alone. The number of checks, their amount and date are as follows (R. 461a):

Exhibit Number	Number of Checks in Exhibit	Inclusive Dates of Checks in Exhibit	Dollar Amount of Checks in Exhibit
Deft. 12	3	July 14, 1955 to September 2, 1955	$ 10,892.02
Pltf. 24	1	August 5, 1955	$ 10,979.60
Deft. 13	142	August 16, 1955 to November 18, 1955	$ 79,772.84

Deft. 11	28	November 18, 1955 to January 3, 1956	$ 6,427.63
Totals	174		$108,072.09

All except two of the above 174 checks were written on or after August 16, 1955, and most of them were written after October 5, 1955. All of the above checks in Defendant's Exhibits 11 and 13 were written after taxpayer knew of Donchester's unpaid withholding and employment tax liabilities. In addition, all or most of the checks in Defendant's Exhibit 12 and Plaintiff's Exhibit 24 were written after taxpayer had knowledge of Donchester's tax delinquencies (R. 462a).

During the fall of 1955, the financial affairs of the Donchester Manufacturing Company went from bad to worse, despite the fact that the Peay Manufacturing Company was now purchasing most of Donchester's production. Donchester's continuing losses were apparently a result of the "piece rates" at Donchester which had been established by taxpayer. These piece rates made Donchester "a continued high cost plant" (R. 462a).

By October of 1955, Donchester had begun to fall behind on its payments in connection with the $25,000 chattel mortgage loan from Morris Kardon. This is the loan which Kardon had made to Donchester in July 1955, as outlined earlier. In addition, Donchester also owed "a couple months" rent to Kardon, or to one of his companies. In December 1955, Kardon decided to foreclose the chattel mortgage which he had received to secure his $25,000 loan to Donchester in July 1955. In addition, Kardon also moved to assert his rights under Pennsylvania law as an unpaid landlord. Kardon asserted his landlord's rights by levying on all of Donchester's property in the Arch Street premises, other than the property of which he was mortgagee. The

property covered by the mortgage was made the subject of a judgment in replevin in favor of Kardon (R. 462a-463a).

On or about December 28, 1955, Kardon leased the former Donchester premises to the Peay Manufacturing Company. The machinery and similar property on those premises was sold to Peay by Kardon, who gave Peay a bill of sale for that property. In return, Peay paid Kardon the remaining amount owed to him under the terms of his July 1955 note from Donchester. In addition, Peay paid Kardon Donchester's back rent. In this way, Kardon was repaid the full amount of his July 1955 loan to Donchester. In addition, he received all of his rent payments, and acquired a new and solvent tenant in Donchester's Arch Street premises (R. 463a-464a).

The trial testimony contains sharply conflicting testimony as to the identity of the person who originated the idea for the transaction just described. Isaacson, an officer of Peay, testified that it was taxpayer's idea. Taxpayer denied this (R. 464a-465a).

As soon as taxpayer was advised of the above transaction, he refused to deal further with Peay and the former Donchester assets. In this way, the Donchester Manufacturing Company came to an end (R. 466a-467a).

Joseph Datlof's powers and duties as Donchester's President and Treasurer.

The agreement between the incorporators of the Donchester Manufacturing Company provided that taxpayer was to devote his entire time and attention to Donchester's business. Under the terms of that agreement, taxpayer was the only full time officer of the Donchester Manufacturing Company. Taxpayer was fully aware of this provision of the incorporator's agreement. In addition, taxpayer re-

mained Donchester's only full time officer throughout Donchester's entire existence (R. 467a-468a).

Under the terms of the By-laws of the Donchester Manufacturing Company, taxpayer, as president of Donchester, had "general and active management of the business of the Corporation". In addition, as treasurer, he was empowered to keep the books of the corporation and to collect, deposit, and disburse its funds (R. 469a).

Taxpayer had the power to write checks for the corporation without cosignature. The checks were honored in large numbers by the Broad Street Trust Company (R. 469a). Taxpayer had the power to borrow money from the Broad Street Trust Company on behalf of Donchester and he made use of that power. Taxpayer was the only corporate officer of Donchester who drew a salary from that firm. Donchester's federal corporate income tax returns, Forms 1120, for the years 1954 and 1955, respectively, are both signed by taxpayer. Similarly, Donchester's Forms 941, employer's quarterly federal tax return, for the first three quarters of 1955, respectively, were prepared for taxpayer's signature as "Pres.". In addition, the Forms 941 were prepared for taxpayer's signature by his bookeeper-secretary, Miss Shaftman, in the normal course of business and those forms, were, in fact, submitted to taxpayer for signature. In addition, Miss Shaftman testified that, in the normal course of business, Donchester's Pennsylvania state tax returns and Philadelphia city tax returns were prepared by her and submitted to taxpayer for signature (R. 469a-471a).

Donchester's other financial records were also prepared for examination by taxpayer. Donchester's independent auditor, Irvin Sklar, submitted "tax records" to taxpayer. It was taxpayer with whom Sklar reviewed Donchester's withholding tax situation in the year 1955 and it was taxpayer who presented Sklar's figures to Donchester's board of directors during the 1955 meeting of the board which discussed Donchester's withholding tax liabilities (R. 471a).

Within Donchester, withholding tax matters were handled by the payroll department, which was supervised by Miss Shaftman. In addition, Miss Shaftman also had charge of Donchester's accounts. Miss Shaftman's desk was located immediately outside of taxpayer's office and there was no one located closer to taxpayer than herself. Miss Shaftman regarded taxpayer as her boss and taxpayer testified that Miss Shaftman worked under his supervision. As a result of the working relationships just described, Miss Shaftman went to taxpayer for advice when she discovered that Donchester had failed to pay its federal withholding taxes. Taxpayer advised her to contact Mr. Sklar and Mr. Schwartz and she did so in obedience to his directions (R. 471a-472a).

Taxpayer opened Donchester's bank account at the Broad Street Trust Company in 1945 pursuant to the resolution of Donchester's board of directors on November 9, 1945. Similarly, when Donchester went out of existence, taxpayer withdrew the remaining sums in the firm's bank account and turned that money over to Donchester's attorney (R. 472a-473a).

It was also taxpayer who established the prices at which Donchester sold its products. He was in charge of hiring and firing at Donchester. For example, it was taxpayer who hired Miss Shaftman and who established what her pay was to be. In addition, taxpayer hired, trained, and supervised all of Donchester's foremen. The foremen, in turn, determined which of the subordinate employees would be hired and fired. Finally, when in the year 1953 Mr. Bernard Stoumen of Brentwood induced taxpayer to place Stoumen's son-in-law on Donchester's payroll, taxpayer "threw him [the son-in-law] out", despite the fact that this step was not calculated to please Stoumen (R. 473a-474a).

In addition to all of his other activities, taxpayer also found time to represent Donchester at trade association

meetings, to arrange for Donchester's insurance; to conduct negotiations with two unions at Donchester's plant, and to negotiate subcontracts with other firms (such as the Berkey Corporation) which produced some of the garments which Donchester then resold to others (R. 474a).

Taxpayer admitted at the trial that he paid other creditors of the Donchester Manufacturing Company after he knew that Donchester was in arrears in its tax payments. Taxpayer "paid some of the express companies and some of the light companies and that sort of thing" to the extent of $108,072.09, while failing to pay over to the Federal Government the $37,704.10 in withholding and employment taxes which Donchester had collected from the wages of its employees (R. 475a-476a).

The District Court summarized this evidence as follows (R. 476a):

> The evidence produced at the trial of this case therefore indicates with great clarity that it was Mr. Joseph Datlof who was vested with full control over all the activities of the Donchester Manufacturing Company, including its financial affairs and its payment or nonpayment of withholding and employment taxes. The trial record also indicates with great clarity that Mr. Datlof knew of Donchester's unpaid withholding and employment tax liabilities at some time in July, or, at the latest, early in August of 1955, but that he nevertheless subsequently paid many of Donchester's other creditors while failing to pay over to the Federal Government the taxes collected from the wages of Donchester's employees.

On the basis of the foregoing, the court concluded that taxpayer was a person within the meaning of Section 6671(b) of the Internal Revenue Code of 1954 who was under a duty to collect and pay over withholding taxes and that he willfully failed to pay over those taxes (R. 479a-485a).

REASONS FOR GRANTING THE WRIT.

1. Only the Supreme Court of the United States can establish a uniform rule on a tax issue and be sure that it will be followed. The Tax Court of the United States and the Court of Claims do not consider themselves governed by Courts of Appeals' decisions but are guided by Supreme Court decisions. Various Appellate Courts do not agree with each other on interpretation of tax laws.

It appears in cases pursued by the Government under Section 6672 of Title 26 U. S. C. (Internal Revenue Code of 1954) that the lower courts, District and Courts of Appeals, are at odds and differences on the interpretation of a responsible person thereunder and the questions of willfulness, lack of willfulness and reasonable cause. *U. S. v. Slattery,* 224 F. Supp. 214; 333 F. 2d 44 (3rd Cir).

Bloom v. U. S., 272 F. 2d 215 (9th Cir. 1959), cert. den. 363 U. S. 802.

Wherefore, on these points, it is believed that this Supreme Court should issue guidelines to govern all of the lower courts in their decisions.

2. The same also appears to hold true in regard to the application of funds collected by the Internal Revenue Service in the collection of taxes under the Social Security (FICA) and withholding taxes assessed against corporations and the responsible officers and employees or others connected with it.

It is felt that this section of the tax laws is still in the development stage and the taxpayer as well as the Government should be given some guides to follow in order that the same is done in a lawful and proper manner.

ARGUMENT.

I. (a) and (b): The Court of Appeals erred in allowing the Commissioner of Internal Revenue to apply withholding and employers' 2% Federal Insurance Contribution Act taxes to the employer's 2% F. I. C. A. (excise) taxes assessment.

The petitioner believes it will be helpful to the Court to repeat herein part of the Appellate Court's Opinion, as follows:

The Court of Appeals in its Opinion states, inter alia,

> "Appellant also contends in the alternative that the Service erroneously included in the assessment the two percent FICA Tax required to be paid by the employer, under 3111 of the Code. For the purpose of this case, the appellee does not dispute that the appellant is not responsible under #6672 for that tax. Under this view, the employer's FICA tax is the least secured of these taxes involved here. The record shows that sums reported due the service by the employer for each of the calendar quarters of 1955 included three taxes: the employer's two percent FICA tax; the employees' withholding tax and the employees' two percent FICA tax. The amounts were as follows:

(1) Calendar Quarter	(2) Employer's FICA Tax	(3) Percentage of Total Quarterly	(4) Employees Withholding & FICA Taxes	(5) Percentage of Total Quarterly	(6) Totals for each Quarter
1st	$3380.70	16.3	$17346.74	83.7	$20727.44
2nd	3437.62	16.4	17537.99	83.6	20975.61
3rd	3179.20	16.1	16581.89	83.9	19761.09
4th	2513.65	16.0	13178.95	84.0	15692.60
Totals	$12511.17	16.2	$64695.57	83.8	$77156.74

According to the Four 'Certificates of Assessments and Payments' (Forms 899-Rev. 6-62) attached to the Stipulation of Facts, the employer, whose principal place of business was in Philadelphia, Pa., made fourteen payments from time to time between March of 1955 and mid-September of 1957, totalling $39910.20 toward the sums due for the four quarters of 1955. The service applied each of the fourteen payments to a total sum due for each quarter (see Table I, Column 6) as shown in footnote 2 below, without making any distinction as to any one of the three taxes involved. In other words for debit and credit purposes it treated the four sums as though they represented a single tax. The service also used a portion of three out of the fourteen payments to offset an equal number of miscellaneous items totalling $457.56 added to the assessment, and for which appellant does not dispute that he is liable. This reduced the total amount of the payments to $39452.64. Summarized by quarters, the applied payments and balances were as follows:

Quarters	*Payments*	*Balances*
First	$20727.44	None
Second	10343.53	$10632.08
Third	4962.64	14798.45
Fourth	3419.03	12273.57
	$39452.64	$37704.10

(TABLE II)

(Footnote 2)

	Date	Amount of Payment	Calendar Quarter to which payment was applied
1.	3/31/55	$13791.14	First
2.	9/30/55	7109.70	Second
3.	12/8/55	3686.50	First
4.	12/8/55	2352.89	First
5.	12/28/55	661.61	Second
6.	1/11/56	13.48	Second
7.	1/11/56	410.11	Second
8.	1/17/56	478.51	Second
9.	1/17/56	1675.12	Second
10.	6/18/56	1268.50	First
11.	1/25/57	2500.00	Fourth
12.	1/25/57	2500.00	Third
13.	4/24/57	2462.64	Third
14.	4/24/57	1000.00	Fourth

The net effect of the Service's application of the fourteen payments, says the appellee, was to liquidate the entire amount owed for the combined three taxes for the first quarter, the employer's tax for each of the last three quarters (since the balance of the payments after being applied to the first quarter was in excess of $9130.47 the total of those three sums) leaving a remainder of $37703.10 for those latter two taxes alone.

In addition this remainder was further reduced to $31498.45 by subtracting $6204.65 directly from it. The $6204.65 consisted of three payments—one of them being the $81.90 item for which he sued to recover, not appearing on Form 899, made after the assessment of September 30, 1957, against Appellant. Thus a total of $45657.28 exclusive of $457.56 item, has been received by the Service toward $77,156.74, the total amount of the combined three taxes originally owed by the employer. The difference is $31499.45, the amount for which judgment was rendered for the Ap-

pellee on its counterclaim. Appellant argues that he is entitled to a credit of $12511.17, the aggregate of the Employer's FICA Taxes for the four quarters or at least to a lesser amount if the taxes are listed separately, as in Table I, and the payments allocated to them on a more equitable basis. At the outset, he cannot be given any additional credit for amounts paid toward the first quarter. The sum of $20727.44 due for that quarter has been discharged—and pursuant to the request of the employer. Any tax formerly owed for that quarter is not at issue in this case. The maximum that could be claimed as a credit is $9130.47, the total for the last three quarters."

(1) The Court refers above to section 3111 of Title 26 U. S. C. (I. R. C. 1954) Chapter 21, which provides that in addition to other taxes, there is hereby imposed on every employer an excise tax, with respect to having individuals in his employ, equal to a certain percentage of the wages paid by him with respect to employment, and in 1955 it was 2 percent.

Whereas section 3402 (Chapter 24) of the Code provides that every employer making payment of wages shall deduct and withhold upon such wages a certain percentage of them, and section 3101 of said Code, Chapter 21, provides that in addition to other taxes, there is imposed on the income of every individual a tax equal to a certain percentage of the wages received by him with respect to employment.

Section 3502 of said Code provides as follows: (a) "The taxes imposed by Section 3101 of Chapter 21, and by Sections 3201 and 3211 of Chapter 22 shall not be allowed as a deduction to the taxpayer in computing taxable income under subtitle A. (b) The tax deducted and withheld under Chapter 24 shall not be allowed as a deduction either to the employer or to the recipient of the income in computing taxable income under Subtitle A.

So it is seen from the foregoing provisions of the Revenue Code Employees' FICA taxes and withholding taxes are not proper, lawful deductions in the employer's income tax return but that the Employer's 2 percent Employees FICA Tax is properly deductible.

This employer's tax has been held to be an excise tax on the privilege of establishing and maintaining the relationship of employer and employee.

The petitioner submits that the collected and paid items in this instant matter for the Four quarters of 1955 were "trust funds" to be used only and allocated to the payment of withholding and employees' FICA taxes and not at all to the employer's FICA excise taxes. That the Commissioner erred when he joined the Employer's FICA taxes and the employees' FICA taxes on his form 941 (Employer's quarterly Tax Return); that the employer's FICA taxes should be on a separate form and not assessed with the other taxes.

It is to be noted that Donchester, in its 1955 Corporate income tax return, being on an accrued basis, took its deductions for the yearly employer's 2% FICA tax (Defendant's Ex. 6).

(2) The Appellate Court finds that there were fourteen payments made as shown on the assessment certificates. This is erroneous as some of the payments were broken up into smaller amounts by the Commissioner and these applied to various periods. For instance, it shows payments of 12/8/55 of $2352.89 and of $661.61. These two were actually one payment by depositary receipt of $3014 paid for the 4th quarter of 1955. The two payments of $2500.00 each on 1/25/57 were actually one payment of $5000.00 and some of the other payments were treated the same way. On March 26, 1957, Donchester in a suit against Chief Apparel Co., Inc., received a check for $3744. It is believed

this payment encompasses the amounts applied of $2462.64 and $1000, dated 4/24/57. The petitioner refers to these payments later in his Argument.

(3) Also shown in the above applied fund schedule it shows payments of $21099.03, an overpayment of $371.59. The difference is for storage handling and advertising expenses which the Court finds petitioner does not object to. Petitioner has objected consistently that he does not owe any of these taxes let alone the expenses. Can such taxes be assessed without a hearing?

(4) The Appellate Court finds Datlof cannot be given any additional credit for amounts paid toward the first quarter; that the sums of $20727.44 due for that quarter has been discharged—and pursuant to the request of the employer; that any tax formerly owed for that quarter is not at issue in this case.

The petitioner contends that this quarter is very much at issue in this case.

The original 100% penalty assessment on petitioner was as follows:

Period	*Amount Tax due*
3/31/55	$ 6039.39
6/30/55	11293.69
9/30/55	14798.45
12/31/55	12373.57
Total	$44405.10

The Commissioner blithely states he has abated the $6039.39 and that is not in the case. Petitioner contends as long as it was part of the 100% penalty assessed against him and no payments were properly applied to it, that it is still open.

The reasons for his contention are these ——

On September 14, 1955, the Internal Revenue Service wrote Donchester Mfg. Co., a letter (P-17) (R. 504a) notifying it that the District Director had issued a warrant for distraint for taxes due for the 1st quarter of 1955 and requested someone from Donchester to appear before it for discussion of the tax problem, and showing the tax as being $6931.31, interest of $173.30 making a total of $7109.70.

On September 22, 1955, Mr. Datlof replied by letter to the Service (P-18) (R. 505a) referring to its letter and their subsequent conversation that they would make payment of the withholding tax for the first quarter by September 30, including the amount of $173.40 for interest.

On September 28, 1955, Donchester by Mr. Datlof wrote to the Service a letter stating that as per their letter of September 22, 1955, they were enclosing its corporate check in the amount of $7109.70 for social security and withholding taxes and interest (Ex. P-20) (R. 506a).

The Commissioner did not follow these instructions but improperly applied depositary receipts paid by Donchester for October and November 1955 withholding taxes of respectively $3686.50 and $3014.50. This $3014.50 as shown above was broken down into two payments of $2352.89 and $661.61. See Exhibits P-2, P-3, P-4 and P-5 (R. 488a-491a).

Examining again the Commissioner's Certificate of Assessments, and from the foregoing, he could not have lawfully used and applied the following amounts for employer's FICA excise taxes:

(1) $7109.70—applied to second quarter.
This was designated by taxpayer for withholding taxes for the first period. (Trust funds)

(2) $3686.50
2352.59 (actually $3014.50)
applied to first quarter although paid by depositary receipts for withholding taxes for 4th quarter.
(Trust funds)

(3) $661.61—applied to second quarter,
although paid by depositary receipt for 4th quarter.
(Trust funds)

(4) $2500.00
$2500.00—actually one payment of $5000.00 for withholding taxes.

By agreement dated January 18, 1957, Peay Mfg. Co., United Container Company, Blems Corporation and L. Zemstein and Company: Zemstein purchased all of the remaining machinery on the 4th and 5th floors of the Pilling Building (originally Donchester's assets) from Peay for $25500.00. One of the provisions of this agreement was that Zemstein had to obtain on or before January 23, 1957, approval from Donchester of the application of $5000.00 of the moneys to be paid therefrom to the District Director for Donchester's liability for withholding taxes. This approval was given by Donchester and thereafter the Director was paid the $5000.00, to be applied on Donchester's delinquent withholding taxes for 1955. The Internal Revenue Service has acknowledged in writing that said proceeds were applied against withholding taxes.

Wherefore, petitioner contends he is entitled to the aforesaid $12511.17 that was applied to the employer's FICA excise tax. That the Appellate Court is in error when it finds no requests or directions accompanied the payments.

It seems very unfair, unjust and inequitable and un-American to make such assessments against the petitioner in addition to his having lost all of his investment in the business and under all the circumstances of this case.

In *Tozier et ux. v. U. S. et al.*, 64-2 U.S.T.C. #9620, the Court held, inter alia,

"* * * The defendant applied $7920.47 of the funds it received from the assets of National in full payment

of the employer's portion of FICA, penalties and interest for the quarter ending 6/30/56, and $2210.19 of such funds (which were actually depositary receipts) to payments of the employer's portion of FICA, penalties and interest for the quarter ending 12/31/56. The non-payment of employer's portion of FICA, penalties and interest would not have resulted in any penalty against the plaintiffs or third-party defendants. The defendant's decision to so apply such funds, rather than to apply them to payment or partial payment of withholding and employees' portions of FICA, therefore resulted in increasing the amounts of the 100% penalty imposed upon the plaintiffs and third party defendants by the sum of $10130.66. That such misapplication by the defendant of monies received for the payment of trust fund taxes to the payment of non-trust fund taxes, penalties and interest, constituted a breach of trust by the defendant under all the circumstances, and resulted in the imposition of penalties against plaintiff and third-party defendants, $10,130.66 greater than if such funds had been properly applied. * * *."

Also, *Cellura v. U. S.*, 65-2 USTC #9635.

Spivak et al. v. U. S., 66-1 USTC #9384.

Section 6653 of the Internal Revenue Code of 1954 provides for a 5% fraud penalty and a 25% delinquency or negligence penalty.

A number of cases have held that liability under Section 6672 is a liability separate and distinct from that imposed upon the employer by other sections of the Code.

Rosenberg v. U. S., 64-1 USTC #15545, 327 F. 2d 362, 364-365; and *U. S. v. Molitor*, 64-2 USTC #9820, 337 F. 2d 917; *Levy v. U. S.*, 140 F. Supp. 834, 835, and *Stanton v. Machiz*, 183 F. Supp. 719.

It is still further contended that the assessments against Donchester Manufacturing Company, Inc., and petitioner were improper and unlawful for being lumped together instead of being broken into its component parts so that they could be distinguished and properly applied.

II. (a) If petitioner was the responsible person or officer of Donchester Mfg. Co., Inc., as provided in Section 6671 and 6672 (which is not admitted), his acts of omission or commission were not willful and were done with reasonable cause.

The Commissioner of Internal Revenue herein had made assessments for each of the four quarters of 1955 and under the law each quarterly period stands upon its own facts, but the Courts below have failed to take this into consideration.

As to the first quarter of 1955, we see that by misapplication of payments the first quarter is kept open. However, there has been no issues of "responsible person" and "willfulness" involved herein.

As to the second quarter of 1955 one of the most compelling facts pertaining to lack of willfulness is that petitioner was not aware of the tax situation of Donchester until the middle of or late July or early August, but prior to the meeting with Mr. Martucci (R. 452a). This fact has not been contradicted by the Government.

As we know the second quarter ended June 30, 1955, and the taxes had to be paid not later than July 31, 1955.

Wherefore, if Mr. Datlof did not have any knowledge whatsoever of the 2nd quarter's tax delinquencies until after the period had expired, and that Donchester had no funds at that time with which to pay the taxes, how could there be any willfulness on Mr. Datlof's part. It is sub-

mitted that lawfully there cannot be a finding of willfulness for that 2nd period.

Since the petitioner did not know that the taxes were past due and unpaid until shortly before, at, or shortly after the time they were to be paid, he could not have willfully failed to collect, pay or truthfully account for them, within the meaning of Section 6672. Mere negligence or lack of knowledge, failing to ascertain the facts, is not enough to render petitioner liable for the penalty. *Levy v. U. S.*, 140 F. Supp. 834, 836.

As to the third quarter of 1955, Donchester was substantially out of funds and was financed by advances from other firms for whom it was doing work. As indicated by Exhibit P-20 (R. 506a) Donchester was able to pay $7109.70 for withholding taxes out of current funds on account of taxes due for the 1st quarter. The trial court found (No. 42) (R. 457a) as follows:

> "Meanwhile from July 1955 onward, Donchester was financing its operations, at least in part, out of the proceeds of advances made by the firms, such as McGregor, for which Donchester was to produce goods (Tr. 618-619). Similarly, the Peay Manufacturing Company was called upon to make advances to Donchester and did so (Tr. 629-630). In addition, Donmoor, Peay's corporate parent, advanced some of the payroll money needed by Donchester (Tr. 170; 560-561). As a consequence Peay lost heavily when Donchester failed" (Tr. 609, 590-591).

As can be seen thereby, Donchester was not using its own money when it was drawing checks for the operation of the business but was money entrusted to it by its customers to produce their merchandise.

In the trial court's finding of fact No. 37 (R. 455a) it finds, inter alia,

"All they had to do was to get a Government man to walk in and just show himself there, and I would have trouble, so I went to Martucci with that in mind. I explained it to him that way, that if we were to operate, if we were to be able to do anything with this we have got to keep the thing running at a level, and he agreed to it, and so we proceeded to operate."

Even though its employment and withholding taxes were known to defendant. Donchester then continued its operations based upon said advance for the 3rd and 4th quarters.

As to the 4th quarter of 1955, Donchester continued to operate without funds of its own, but with funds of its customers including Peay for the finishing of their products. The Internal Revenue Service continued to permit it to remain in business and operate as it was doing. Two substantial payments on the fourth quarter's taxes were paid on time. The Peay people were in charge of Donchester from sometime in November 1955 and were operating the business and advancing the payrolls and other monies.

Further the Government was lax and negligent in the collection of said taxes through levies upon Donchester when requested to do so by petitioner, Datlof. If it had done so, all of such taxes would have been paid in full.

Petitioner contends that he has overcome the presumption of correctness of the defendant's assessments and that the burden of proof was on the Commissioner to prove same to uphold his counter-claim which he has failed to do.

The Record further shows that Mr. Datlof left Donchester's operation completely sometime in December 1955 so he should not be charged, at least, with the December 1965 taxes.

Also, inasmuch as petitioner had such an agreement for the last two quarters of 1955 with the Internal Revenue Service to continue operating Donchester as he had been doing and Donchester having paid two installments of the

4th quarter in December 1955, it cannot be said or held that he willfully failed to collect and pay over such taxes.

(b) The Appellate Court erred in finding petitioner was the responsible person of Donchester as provided by Section 6672 to collect and pay over withholding and F. I. C. A. taxes.

Petitioner claims and contends that Bernard Stoumen of "Brentwood" was such responsible person; that he, Datlof, was only a puppet in the hands of Bernard Stoumen. That after a study of the evidence of the case and of the record, a reviewing Court can only be left with the definite and firm conviction that a mistake has been committed, and that the lower Courts misapprehended the effect of the evidence and based their Conclusions of Law upon an erroneous view of the law.

United States v. United States Gypsum Co., 333 U. S. 364, 395, 68 S. Ct. 525, 542, 926 Ed. 746.
United States v. Singer Mfg. Co., 374 U. S. 174, 194, N. 9; 10 L. Ed. 2d 823, 83 S. Ct. 1773-4.

Petitioner further contends that he was not the responsible person that had the power to disburse corporate funds, and to decide which creditors of Donchester were to be paid first. That he was never in control and domination of Donchester policies and finances, particularly, and at least, in the first two quarters of 1955.

Also that it was Bernard Stoumen, as the dominating stockholder, who controlled it and by his improper actions, conduct and defaults, put Donchester in the poor financial position to which it declined.

That petitioner's principal duties during, at least, the first three quarters, were those of a factory man and head thereof, rather than as an office administrative officer. He

did not have the sole right to pay bills. If he had such sole right he would have paid the tax deficiencies rather than have gone to the Internal Revenue Service of his own volition and ask for its help. He was never designated by Donchester's Board of Directors as such responsible person.

The mere holding of corporate office does not, ipso facto, make for personal liability on the part of the officer. Nor does a by-law describing the duties of a corporate officer do so. He did not have authority to sign corporate checks alone as they also had to be signed by Mr. Schwartz. Mr. Datlof testified and explained to the Court that when Mr. Schwartz was not available he signed the checks, they were processed, and that Miss Shaftman had an arrangement with the bank that Mr. Schwartz would later sign a letter indicating such checks were approved by him. This protected the bank and carried out the two-signature restriction. Verification of this necessity for two signatures is evidenced by the corporate minutes dated December 21, 1955, wherein it states:

> "Resolved, that in view of Mr. Schwartz's resignation which stated it was effective immediately, and of the necessity of drawing checks to pay pressing bills and payroll, that all checks on the Company's account until January 3, 1956, be valid upon the signature of Mr. Datlof, the President alone."

The recent case of *MacNeill v. U. S. A.*, 66-1 USTC #9229 describes the principles of law that apply to this case as to a responsible person. The Record.

It was also petitioner's belief that Donchester would derive sufficient funds from the suit against Brentwood to pay said taxes.

III. The Court of Appeals erred in not finding the Government negligent in its failure to levy on and collect promptly Donchester's assets.

It is submitted that it was the Government's own negligence and lack of diligence in its failure to collect the taxes involved herein. The petitioner gave it timely information as to Donchester's assets and current status which should have been levied upon but the Internal Revenue Service did not follow it up. The District Court's Findings of Fact disclose Mr. Datlof's attempts to have the "Service" act to collect the taxes by levy. They show his letters and visits to the various Revenue Officers. If they had complied with his requests they would have received sufficient funds to pay off the due taxes. *Tozier et al. v. U. S., et al., supra.*

This Court is requested to note that the Trial Judge refused to allow the petitioner to put into the record all of his efforts to have the "Service" collect the taxes which occurred in 1956 and 1957, particularly so when his assessment was not made until September 30, 1957. The petitioner was greatly harmed by this ruling which it is claimed was reversible error that can be decided by this Court.

On April 14, 1966, the petitioner filed his Notice of Appeal with the District Court and on April 19, 1966, a bond for costs on appeal of $250.00 was filed. On May 3, the Record was transmitted to the Court of Appeals.

On June 8, 1966, the defendant filed a bill of costs in a very substantial amount.

It is respectfully submitted by the petitioner that under the circumstances of this case that this Court find and order that no costs should be taxed against him.

CONCLUSION.

For the foregoing reasons it is respectfully submitted that this petition for a Writ of Certiorari be granted.

ROBERT M. TAYLOR,
Attorney for Petitioner.

APPENDIX.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT.

No. 15,932.

JOSEPH DATLOF,
Appellant,

vs.

UNITED STATES OF AMERICA.
(D. C. Civil No. 31805.)

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA.

Present:
GANEY, SMITH and FREEDMAN, Circuit Judges.

JUDGMENT.

This cause came on to be heard on the record from the United States District Court for the Eastern District of Pennsylvania and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court, filed March 24, 1966, be, and the same is hereby affirmed.

ATTEST:
IDA O. CRESKOFF,
Clerk.

December 29, 1966.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 15932

JOSEPH DATLOF,

Appellant,

v.

UNITED STATES OF AMERICA

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Argued November 1, 1966

Before: GANEY, SMITH and FREEDMAN, Circuit Judges.

OPINION OF THE COURT.

(Filed December 29, 1966.)

By GANEY, *Circuit Judge.*

Appellant, Joseph Datlof, brought a civil action for refund of $81.90 paid by him to the Internal Revenue Service. The appellee, United States, counterclaimed for $31,499.45 representing the balance unpaid from a deficiency assessment against appellant in September of 1957 under §6672

of the Internal Revenue Code of 1954, 26 U. S. C. A. §6672,[1] for employees' federal income withholding taxes and the then two percent F. I. C. A. taxes "deducted" during the last three calendar quarters of 1955 from the wages of employees of a manufacturing corporation of which appellant was president and treasurer during the entire period of its existence.

In an opinion in which the evidence was thoroughly analyzed and the findings of fact and conclusions of law were specially set forth with painstaking care, the district court found that appellant was a responsible person whose duty it was to collect and truthfully account for and pay over employees' federal payroll deduction taxes, and that he collected and accounted for such taxes but willfully failed to pay them over to the Service. 252 F. Supp. 11 (E. D. Pa. 1966).

There was substantial evidence to support these findings. They were far from being clearly erroneous. Rule 52(a) of the Federal Rules of Civil Procedure; *Smith v. United States,* 121 F. 2d 692, 694-695 (C. A. 3, 1941); *Bloom v. United States,* 272 F. 2d 215 (C. A. 9, 1959), cert. den. 363 U. S. 803.

Despite the fact that between July 14, 1955 and January 3, 1956, the employer paid creditors other than the Service a total of $108,072.09 by checks signed by appellant, and

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[1] This section provides:

"Sec. 6672. **Failure to Collect and Pay Over Tax, or Attempt to Evade or Defeat Tax.**

Any person required to collect, truthfully account for, and pay over any tax imposed by this title who willfully fails to collect such tax, or truthfully account for and pay over such tax or willfully attempts in any manner to evade or defeat any such tax or the payment thereof, shall, in addition to other penalties provided by law, be liable to a penalty equal to the total amount of the tax evaded, or not collected, or not accounted for and paid over. No penalty shall be imposed under section 6653 for any offense to which this section is applicable. (27 U. S. C. 1964 ed., Sec. 6672.)"

that the employer was forced to cease manufacturing as the result of proceedings instituted by its landlord to collect rents and foreclose on a chattel mortgage covering its operating machinery, appellant contends that he should not be held liable for the assessment because assertedly the Service did not use due diligence in 1955 to collect from the employer the taxes upon which the amount of the assessment is based. This reason is not a ground for permitting him to recover the $81.90, nor a defense to appellee's counterclaim. The personal liability created under §6672 is separate and distinct from that imposed upon the employer under §3403 of the Code. *Bloom v. United States*, supra, at 221; *Rosenberg v. United States*, 327 F. 2d 362, 364-365 (C. A. 2, 1964). Also see *Spivak v. United States*, 254 F. Supp. 517, 527 (S. D. N. Y. 1966). The Service need not have attempted to collect from the employer before assessing a responsible person under §6672. *Cash v. Campbell*, 346 F. 2d 670 (C. A. 5, 1965); *Kelly v. Lethert*, 362 F. 2d 629, 635 (C. A. 8, 1966).

Appellant also contends in the alternative that the Service erroneously included in the assessment the then two percent FICA tax required to be paid by the employer under §3111 of the Code. For the purpose of this case, the appellee does not dispute that appellant is not responsible under §6672 for that tax. Under this view, the employer's FICA tax is the least secured of the three taxes involved here. The record shows that sums reported due the Service by the employer for each of the calendar quarters of 1955 included three taxes: the employer's two percent FICA tax; the employees' withholding tax and the employees' two percent FICA tax. The amounts were as follows:

(1) Calendar Quarter	(2) Employer's FICA Tax	(3) Percentage of Total Quarterly Amount	(4) Employees' Withholding and FICA Taxes	(5) Percentage of Total Quarterly Amount	(6) Totals for each Quarter
1st	$ 3,380.70	16.3	$17,346.74	83.7	$20,727.44
2nd	3,437.62	16.4	17,537.99	83.6	20,975.61
3rd	3,179.20	16.1	16,581.89	83.9	19,761.09
4th	2,513.65	16.0	13,178.95	84.0	15,692.60
Totals:	$12,511.17	16.2	$64,645.57	83.8	$77,156.74

(Table I)

According to the four "Certificates of Assessments and Payments" (Forms 899—Rev. 6-62) attached to the stipulation of facts, the employer, whose principal place of business was in Philadelphia, Pa., made fourteen payments from time to time between March of 1955 and mid-September of 1957, totaling $39,910.20 toward the sums due for the four quarters of 1955. The Service applied each of the fourteen payments to a total sum due for each quarter (See Table I, Column 6) as shown in footnote 2 below, without making

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	Date	Amount of Payment	Calendar Quarter to which payment was applied
1.	3/31/55	$13,791.14	First
2.	9/30/55	7,109.70	Second
3.	12/ 8/55	3,686.50	First
4.	12/ 8/55	2,352.89	"
5.	12/28/55	661.61	Second
6.	1/11/56	13.48	Second
7.	1/11/56	410.11	"
8.	1/17/56	478.51	"
9.	1/17/56	1,675.12	"
10.	6/18/56	1,268.50	First
11.	1/25/57	2,500.00	Fourth
12.	1/25/57	2,500.00	Third
13.	4/24/57	2,462.64	"
14	4/24/57	1,000.00	Fourth
	Total	$39,910.20	

any distinction as to any one of the three taxes involved. In other words for debit and credit purposes it treated the four sums as though they represented but a single tax. The Service also used a portion of three out of the fourteen payments to offset an equal number of miscellaneous items totaling $457.56 added to the assessment, and for which appellant does not dispute that he is liable. This reduced the total amount of the payments to $39,452.64. Summarized by quarters, the applied payments and balances were as follows:

Quarter	Payments	Balances
First	$20,727.44	—None—
Second	10,343.53	$10,632.08
Third	4,962.64	14,798.45
Fourth	3,419.03	12,273.57
Totals:	$39,452.64	$37,704.10

(Table II)

The net effect of the Service's application of the fourteen payments, says the appellee, was to liquidate the entire amount owed for the combined three taxes for the first quarter, the employer's tax for each of the last three quarters (since the balance of the payments after being applied to the first quarter was in excess of $9,130.47 the total of those three sums), and part of the employees' withholding and FICA taxes, leaving a remainder of $37,703.10 for those latter two taxes alone.

In addition this remainder was further reduced to $31,498.45 by subtracting $6,204.65 directly from it. The $6,204.65 consisted of three payments—one of them being the $81.90 item for which he sued to recover, not appearing on Form 899, made after the assessment of September 30, 1957, against appellant. Thus a total of $45,657.29, ex-

clusive of the $457.56 item, has been received by the Service toward $77,156.74, the total amount of the combined three taxes originally owed by the employer. The difference between these two figures is $31,499.45, the amount for which judgment was rendered for the appellee on its counterclaim.

Appellant argues that he is entitled to a credit of $12,511.17, the aggregate of the employers' FICA taxes for the four quarters, or at least to a lesser amount if the taxes are listed separately as in Table I and the payments allocated to each of them on a more equitable basis.

At the outset, he cannot be given any additional credit for amounts paid toward the first quarter. The sum of $20,727.44 due for that quarter has been discharged—and pursuant to the request of the employer. Any tax formerly owed for that quarter is not at issue in this case. The maximum that could be claimed as a credit is $9,130.47, the total for the last three quarters.

If the balance of $24,929.75 ($45,657.19 minus $20,727.44) were applied to the oldest item first, then the total sum of $20,975.61 (See Table I, Column 3, second quarter) would also be discharged, and the maximum that could be claimed as credit by this method of application of payments would be $5,692.85, i.e., $3,179.20 plus $2,513.65. However, the remainder of $3,954.14, after discharging the sum owed for the second quarter, could also have been applied in two ways. One, against the $3,179.20 employer tax owed for the third quarter and the excess against the employees' taxes, leaving only a possible credit of $2,513.65, the employer's tax for the fourth quarter. And two, on a pro rata basis against $3,179.20 and $16,581.89 (See Table I, Columns 2 and 3, third quarter). This would leave a possible credit of $2,542.58 ($3,179.20 minus $636.62) plus $2,513.65, or a total sum of $5,066.23.

The figure of $24,929.75 could also have been applied on

a pro rata basis to the three taxes owed by the employer for the last three quarters of 1955. The employer's tax for that period is $9,130.47. Sixteen point four percent of $24,929.75 is $3,918.62. Subtracting this amount from $9,130.47, leaves $5,212.85, the maximum amount which appellant could have been given credit by this method.

Assuming that, if made, the Service would be required to obey a request or direction from an employer that a certain payment be applied to a specific account due for payroll taxes, there is nothing in the record beyond the request that a check for $7,109.70 be used to defray the sum owed for the first quarter to show that the remittances here were accompanied by any such request or direction. The first quarter has been discharged, so appellant has not been harmed if the Service applied the $7,109.70 check to the second quarter instead of the first. In the absence of requests or directions accompanying the other payments, we know of no federal law or regulations which required to apply those payments to the oldest item due or on a pro rata basis.[3] For examples, see *Gemological Institute of America v. Riddell*, 149 F. Supp. 137 (S. D. Cal. 1957); *United States v. Ragsdale*, 206 F. Supp. 613 (W. D. Tenn. 1962); *Graper v. United States*, 206 F. Supp. 173, 179-180 (D. C. Ore. 1961).

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[3] For the Pennsylvania rule, see **Dubois National Bank v. Hartford Accident & Indemnity Co.**, 161 F. 2d 132, 137 (C. A. 3, 1947), citing **Woods Trust**, 350 Pa. 290, 294, 38 A. 2d 28, 30, and **Page v. Wilson**, 150 Pa. Super. 427, 433, 28 A. 2d 706. The Superior Court of Pennsylvania stated the rule as follows: "The debtor has a right to make the application, in the first instance, and failing to exercise it, the same right devolves on the creditor. When no application is made by either party, the law determines how the payments are to be applied in accordance with equitable rules and principles, and primarily it deems the payments to have been made in discharge of the earliest liabilities of a running account—each item of credit is applied in extinguishmnt of the earliest debit items in the account; in other cases, it will apply the payment, when not appropriated by either party, in the way most beneficial to the creditor, that is, to the **debt least secured**, unless to the prejudice of a surety."

Consequently, the district court's refusal to reduce the assessment was not erroneous.

The judgment of the District Court will be affirmed.

A True Copy:

Teste:

Clerk of the United States Court of Appeals for the Third Circuit.

In the Supreme Court of the United States

OCTOBER TERM, 1966

No. 1196

JOSEPH DATLOF, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner was president, treasurer and a member of the board of directors of Donchester Manufacturing Company, a corporation engaged in the manufacture of clothing (Pet. 45; R. 437A, 443A).[1] Federal income and F.I.C.A. taxes were withheld from the wages of the corporation's employes, but not all of these withheld taxes were paid over by the corporation to the government (R. 437A). On September 30, 1957, the Commissioner of Internal Revenue, acting under

[1] "R." references are to the appendix to the brief for petitioner in the court of appeals; "Supp. R." references are to Appendix B to the brief for the government.

Section 6672 of the Internal Revenue Code of 1954,[2] made an assessment against petitioner in respect of the employees' withholding and F.I.C.A. taxes which were not paid over during the last three quarters of 1955. Petitioner paid $81.90 of the assessment and brought suit for a refund thereof. The government counter claimed for $31,499.45, which represented the unpaid balance of the assessment (Pet. 44–45; R. 438A). After trial the district court, sitting without a jury, found that petitioner was an officer of the corporation responsible for collecting, truthfully accounting for and paying over the withheld taxes and that he collected and accounted for such taxes but willfully failed to pay them over (Pet. 45). The district court also held that the amount of the assessment against petitioner was correct (R. 477A–479A).

The court of appeals affirmed (Pet. 44–51). It held that the district court's findings were supported by "substantial evidence * * *. They were far from being clearly erroneous" (Pet. 45). It concluded that petitioner's contention that the Internal Revenue

[2] That section, 26 U.S.C. 6672, provides as follows:

SEC. 6672. FAILURE TO COLLECT AND PAY OVER TAX, OR ATTEMPT TO EVADE OR DEFEAT TAX.

Any person required to collect, truthfully account for, and pay over any tax imposed by this title who willfully fails to collect such tax, or truthfully account for and pay over such tax, or willfully attempts in any manner to evade or defeat any such tax or the payment thereof, shall, in addition to other penalties provided by law, be liable to a penalty equal to the total amount of the tax evaded, or not collected, or not accounted for and paid over. No penalty shall be imposed under section 6653 for any offense to which this section is applicable.

Service did not use due diligence in collecting from the corporation the taxes upon which the assessment was based provided no ground for his prevailing as to his Section 6672 liability (Pet. 46). It further held that the district court properly refused to reduce the amount of the assessment against petitioner (Pet. 46-51).

1. Section 6672 of the Internal Revenue Code provides that a corporate officer who willfully fails to pay over to the government income and social security taxes which the corporation has withheld from the wages of its employees shall be "liable to a penalty equal to the total amount of the tax * * * not collected, or not accounted for and paid over." The concurrent findings of the two courts below that petitioner was the person responsible for paying over the withheld taxes and that he willfully failed to do so are amply supported by the evidence and do not warrant further review. *Comstock* v. *Group of Investors,* 335 U.S. 211, 214; *Rudolph* v. *United States,* 370 U.S. 269, 271.

Petitioner argues that he was not a person responsible for paying over the withheld taxes because he was "only a puppet" and had no power to disburse corporate funds (Pet. 39). This argument presents only a factual question which was resolved against petitioner by the district court, and its determination in this regard was upheld by the court of appeals. Petitioner's power to control the finances of the corporation is apparent from the fact that, during the period in question, he disbursed corporate funds total-

ing $108,072.09 by drawing 174 checks bearing his signature alone (R. 461A). Petitioner's further assertion (Pet. 36–38) that his failure to pay over the withheld taxes was not willful because he did not know such taxes had not been paid until the corporation had no funds of its own with which to pay the taxes is also factually incorrect. The district court noted that when petitioner was first informed that the corporation was delinquent in the payment of its taxes, the taxes here in question were not yet due (R. 452A). Thus, when he later disbursed substantial corporate funds to creditors other than the United States, he did so knowing that the taxes for the last three quarters of 1955 were unpaid, and therefore his failure to pay over the withheld taxes was willful within the meaning of Section 6672. *Bloom* v. *United States* 272 F. 2d 215 (C.A. 9), certiorari denied, 363 U.S. 803; *Frazier* v. *United States,* 304 F. 2d 528 (C.A. 5).

2. Petitioner contends that the Internal Revenue Service did not exercise due diligence in collecting the withheld taxes from the corporation and that the district court erred in refusing proffered evidence in this connection (Pet. 41). The penalty imposed by Section 6672 is separate and distinct from the tax in respect of which it is imposed. The only significant connection between the two is that the latter determines the amount of the former.[3] *Bloom* v. *United*

[3] Since the amount of the unpaid tax determines the amount of the Section 6672 penalty, no "double penalty" is imposed upon amounts which a responsible officer willfully fails to pay over but which are later collected from the corporation. *United States* v. *Molitor*, 337 F. 2d 917, 924 (C.A. 9).

States, supra, at 221; *Rosenberg* v. *United States,* 327 F. 2d 362, 364–365 (C.A. 2). It is well settled that a responsible officer cannot avoid the Section 6672 penalty on the ground that the government failed to look first to the corporation for payment of the withheld taxes. *Spivak* v. *United States,* 370 F. 2d 612 (C.A. 2), petition for certiorari pending, No. 1205, 1966 Term; *Kelly* v. *Lethert,* 362 F. 2d 629 (C.A. 8); *Cash* v. *Campbell,* 346 F. 2d 670 (C.A. 5). See *Phillips* v. *Commissioner,* 283 U.S. 589. *Tozier* v. *United States* (W.D. Wash.), decided April 13, 1965 (65–2 U.S.T.C., par. 9621), relied upon by petitioner, is not to the contrary, but rather, as pointed out by the district court (R. 486A), is plainly distinguishable on its facts. Therefore, the alleged lack of diligence of the Internal Revenue Service in collecting the withheld taxes from the corporation,[4] and petitioner's proffered evidence in respect thereto, are irrelevant.

3. Finally, as the court of appeals concluded, the amount of the judgment entered against petitioner is correct. The Donchester Manufacturing Company owed three taxes for each quarter of 1955, totalling $77,156.74 (Pet. 47):

Employer's two percent F.I.C.A. tax,

[4] The record shows that petitioner's allegation of lack of due diligence on the part of the Internal Revenue Service is unfounded. Before the corporation ceased operating, petitioner repeatedly requested the Service not to collect the tax from the corporation (R. 454A–455A). After the corporation ceased operating, all of its assets were subject to a chattel mortgage and landlord's levy, both of which were arranged by petitioner (R. 463A–464A). Therefore, there were no assets of the corporation from which the Service could have collected the withheld taxes.

Employees' federal income withholding tax, and

Employees' two percent F.I.C.A. tax.

Fourteen payments aggregating $39,910.20 were received from Donchester between March of 1955 and April of 1957 toward the above taxes. The Internal Revenue Service applied each of the payments to the total sum of all three taxes due for each quarter, with the exception of portions of three of the fourteen payments applied to miscellaneous items totalling $457.56.[5] The net effect of the Service's application of the fourteen payments was to liquidate the entire amount owned for the combined three taxes for the first quarter of 1955, the employer's tax for each of the last three quarters, and part of the employees' withholding and F.I.C.A. taxes for the last three quarters. This left $37,704.10 in employees' withholding and F.I.C.A. taxes unpaid. From this amount was subtracted $6,204.65, representing three payments made after the date of assessment, September 30,

[5] These miscellaneous items were as follows: Interest on unpaid taxes to March 1, 1956, $80.97 (Supp. R. 5b); expenses incurred in the seizure and sale of corporate assets, $47.25 (advertising) and $324.34 (storage and handling) (Supp. R. 2b); and a penalty of $5 in respect of a check for $486.88 returned unpaid (R. 3b). Section 6601(a) imposes interest at the rate of six percent per annum on unpaid taxes. Section 6342 authorizes application of money received from the sale of seized property to the expenses of levy and sale. (Some of the "payments" were the proceeds of the sale of the corporation's assets.) Section 6657 provides that if a check for less than $500 in payment of a tax is returned unpaid, a penalty shall be imposed in the amount of $5 or the amount of the check, whichever is the lesser. Thus, each of these miscellaneous items was assessed against the corporation as authorized by statute.

1957,[6] leaving unpaid employees' withholding and F.I.C.A. taxes of $31,499.45. Since taxpayer was liable for a penalty in the amount of employees' withholding and F.I.C.A. taxes not paid over under Section 6672, judgment was entered against him in that amount (Pet. 46–49).

Petitioner argues that the amount of the judgment is incorrect in that $12,511.17 credited by the Service to unpaid employer's F.I.C.A. taxes for all quarters of 1955, for which he is not responsible under Section 6672, should have been credited instead to unpaid employees' withholding and F.I.C.A. taxes, for which he is responsible under Section 6672 (Pet. 27–36). The court of appeals held that this argument, as made in connection with application of taxes for the first quarter of 1955, was without merit, since the taxes for that quarter had been paid by the corporation and liability therefor was discharged at the corporation's request. No assessment was made against petitioner in respect of that quarter, and thus it was not before the court (Pet. 49). The court below also pointed out that if the Service had applied the payments in the manner for which petitioner contends, the maximum amount by which the judgment could have been reduced was $5,212.85 (Pet. 49–50). The court of appeals held, however, that there was no basis for requiring the Service to apply funds in that manner since, as a matter of fact, petitioner had accompanied

[6] For example, the payment of $81.90 which petitioner here seeks to recover was made after the date of assessment and therefore is included in this amount of $6,204.65 (Pet. 48).

the payments with no request or direction as to their application, with the single exception that one payment was accompanied by a request that it be applied to a quarter for which tax liability had already been discharged. Because there was no tax owing for the quarter as to which petitioner directed application, that payment was applied to a subsequent quarter. Since petitioner made no request as to the application of the other payments, the Service could apply them as it wished. *Gemological Institute of America* v. *Riddell,* 149 F. Supp. 137 (S.D. Calif.); *United States* v. *Ragsdale,* 206 F. Supp. 613 (W.D. Tenn.). Petitioner's reliance on *Tozier* v. *United States, supra,* (Pet. 34–35) is misplaced, since the court there held that the taxpayer was not responsible for the unpaid taxes of the corporation. Any consideration which the court there gave to the application of payments by the Service in determining the amount of taxes for which the taxpayer might be responsible was therefore *dictum.*

The holding of the court below is correct and there is no conflict of decisions.[1] For the reasons stated, the petition should be denied.

Respectfully submitted,

THURGOOD MARSHALL,
Solicitor General.

RICHARD C. PUGH,
Acting Assistant Attorney General.

DAVID O. WALTER,
ROBERT H. SOLOMON,
Attorneys.

APRIL 1967.

[1] Petitioner alleges that there is a conflict between the decisions in *United States* v. *Slattery*, 224 F. Supp. 214 (E.D. Pa.), affirmed *per curiam*, 333 F. 2d 844 (C.A. 3), and *Bloom* v. *United States*, *supra*, and, inferentially, between those cases and the holding here (Pet. 26). The court in *Slattery* specifically followed the decision in *Bloom* (224 F. Supp., at 217), as did both courts below in the instant case (Pet. 46; R. 482A, 484A). The different results reached in *Slattery* and *Bloom* are due to factual distinctions present in those two cases.

U.S. GOVERNMENT PRINTING OFFICE: 1967